90-829

No. _____

Supreme Court, U.S.
FILED
NOV 26 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

October Term, 1990

CITY OF FAITH MEDICAL AND RESEARCH CENTER,

Petitioner,

— v.

RUTH H. CREECH,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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November, 1990

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QUESTIONS PRESENTED

1. Whether the Minimum Contacts Doctrine of in personam jurisdiction has been impermissibly broadened when an Ohio Federal Court exercised personal jurisdiction over an Oklahoma medical clinic, Defendant City of Faith Medical and Research Center, when the only contact between Ohio Plaintiff and Oklahoma Defendant was Plaintiff making an appointment by telephone from Ohio and traveling to Oklahoma to receive medical care by an employee of the defendant medical center.

2. Whether a finding by the Sixth Circuit Court of Appeals of "Agency by Estoppel" is proper when the theory was never pleaded by Plaintiff and the record contains no evidence that the City of Faith Medical and Research Center, the legal entity deemed "Principal" by the Court, had any control, or right to control the acts of Oral Roberts Evangelistic Association, or made any representations to third parties that Oral Roberts Evangelistic Association was its "agent."

3. Whether the minimum contacts necessary to empower an Ohio Federal District Court with personal jurisdiction to hear a suit for medical malpractice occurring in Oklahoma have been met, when a legal entity elects to broadcast a tele-evangelist show which referred to the name and phone number of a medical clinic, a separate, distinct, legal entity, located in Oklahoma.

LIST OF PARTIES

The parties to the proceeding below were the Petitioner, City of Faith Medical and Research Center and Respondent, Ruth H. Creech.

Michael McGee, M.D. was a separate appellant/cross-appellee in the Court below. Since the 6th Circuit's ruling was in favor of Dr. McGee on jurisdictional grounds, and none of the issues addressed in this Petition affect Dr. McGee, he is not named as a party herein.

LIST OF PARENT, SUBSIDIARY AND AFFILIATED CORPORATIONS

Petitioner, City of Faith Medical and Research Center is affiliated with City of Faith Hospital and Oral Roberts Evangelistic Association (OREA).

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I. The Sixth Circuit's decision impermissibly broadens the scope of the "Minimum Contacts Doctrine" announced by this Court in *International Shoe v. Washington,* 326 U.S. 310 (1945) and *Hanson v. Denckla,* 357 U.S. 235 (1958) and their progeny, thereby conflicting with the established scope of the doctrine.

II. The Sixth Circuit Court of Appeals improperly applied the doctrine of Agency by Estoppel because the theory was never pleaded nor proved and the record contains no evidence that the legal entity deemed "Principal" by the Court, had a right to control the acts of OREA or made any representations to third parties that OREA was its agent.

III. The minimum contacts necessary to empower an Ohio Federal District Court with personal jurisdiction to hear a medical malpractice suit arising in Oklahoma have not been met, and Defendant's right to Due Process under the 14th Amendment has been violated.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, City of Faith Medical and Research Center (Center), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on July 13, 1990.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is reported at 908 F.2d 75,(6th Cir. 1990), and is reprinted in the appendix hereto, p. 1a, *infra.*

JURISDICTION

Petitioner appealed rulings on Post-trial motions and the jury verdict rendered against it in the Southern District of Ohio. Respondent cross-appealed. The Sixth Circuit Court of Appeals

rendered its opinion July 13, 1990. Petitioner timely filed a Petition for Rehearing which was denied on September 6, 1990. Petitioner files this Petition for Writ of Certiorari invoking the jurisdiction of this court under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Respondent, Ruth H. Creech, an Ohio resident, filed this action in state court in Ohio, raising medical malpractice and lack of informed consent claims against the City of Faith Hospital, the City of Faith Clinic, the City of Faith Medical and Research Center, and physicians Brent Bennett, Michael Laughlin, and Michael McGee. All of the claims arose out of injuries incurred while Creech was a patient at the Hospital in Tulsa, Oklahoma. The Hospital removed the action to federal district court, whose jurisdiction was invoked under 28 U.S.C. § 1332 because of diversity of citizenship, the plaintiff being a citizen of Ohio and the defendants being citizens of Oklahoma. The Petitioner, City of Faith Medical and Research Center, has at all times denied that it was subject to the district court's in personam jurisdiction.

Creech's cause of action arose from medical care and treatment she received in Tulsa, Oklahoma, at the Center. Her cause of action against the Center was based on a theory of vicarious liability of Dr. McGee because of an alleged failure to obtain informed consent prior to performing surgery[1] The Center provided no treatment to Creech in Ohio, has not mailed information to or received mail from Ohio, had no agents or employees present in Ohio, nor did it maintain any office, facility, or business within Ohio.

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[1]Summary Judgment was entered by the trial court prior to trial determining that the Center's liability, if any, was vicarious for the acts of Dr. McGee.

Creech initially became aware of the Center through the "Expect a Miracle" evangelistic television program featuring Oral and Richard Roberts. On some of the broadcasts of the "Expect a Miracle" program, Oral Roberts, the spokesperson for Oral Roberts Evangelistic Association (OREA) and the Oral Roberts Ministries, invited people to come from around the country, as well as from other countries, to the Center for treatment.[2] Each broadcast would begin by showing the City of Faith logo above the words "City of Faith." During the relevant broadcasts, the words "City of Faith Clinic Appointments" and a telephone number appeared on the television screen,[3] accompanied by various pictures of the facilities at the Hospital and the Center.

The "Expect a Miracle" programs solicited funds for the Oral Roberts Ministries, as well as making the viewers aware of the Hospital and the Center. Ohio was one of the states receiving the broadcasts. Creech testified at trial that the broadcasts made her aware of the Hospital and the Center and provided her with information that enabled her to contact the Center and make an appointment for a medical examination.[4]

After the case was removed to federal court, Creech subsequently amended her complaint, adding defendants Oral Roberts and Richard Roberts, and raised fraud claims against them. After further discovery, Creech again amended her complaint, adding the Oral Roberts Evangelistic Association (OREA) as a defendant, dismissing the City of Faith Clinic as a defendant,[5] and raising

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[2]See Testimony of Mark Swadener, August 8, 1988, P. 5; Appendix Page 38a.

[3]Testimony of Mark Swadener, August 8, 1988, P. 16; Appendix Page 41a.

[4]Testimony of Ruth Creech, August 1 and 2, 1988, P. 14; Appendix Page 24a.

[5]The Clinic was dismissed as a defendant because there is no such legal entity as the "City of Faith Clinic."

a fraud claim against OREA. At no time were the fraud claims raised against the medical clinic, the hospital or the doctors.[6]

The district court bifurcated the trial into a liability phase and a damage phase. Just prior to the beginning of the liability phase, Creech voluntarily dismissed the claims against Drs. Michael Laughlin and Brent Bennett. The trial began August 1, 1988 and seven days later, at the close of Plaintiff's case, as a result of a secret settlement agreement, the district court granted a motion for a directed verdict on the issue of fraud and directed the jury to find in favor of the defendants Oral Roberts, Richard Roberts, OREA, the Hospital, and the Center.[7] Under the secret agreement between Plaintiff, Oral Roberts, Richard Roberts and OREA, in exchange for a covenant not to appeal the directed verdict, paid Creech valuable consideration and agreed to indemnify her against any attempts by the Hospital or the Center to collect her outstanding hospital bills.[8] On August 10, 1988, near the completion of the liability phase of the trial, the district court

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[6]See All Conferences and Motions Heard Outside the Presence of the Jury Not Contained in Other Transcripts of Proceedings, Pgs. 13-18; Appendix, Page 33a.

[7]The defendants City of Faith Hospital and City of Faith Medical and Research Center disputed throughout the course of pretrial and trial proceedings that the fraud claims were ever raised against them. Counsel for plaintiffs admitted that the Pretrial Order did not contain fraud claims against the City of Faith Hospital or the City of Faith Medical and Research Center. See All Conferences and Motions Heard Outside the Presence of the Jury Not Contained in Other Transcripts of Proceedings, pages 13-17; Appendix Page 33a.

[8]As part of the settlement agreement, Creech agreed not to discuss its terms. The shroud of secrecy was maintained rigorously throughout the trial by the district court, so much so that the Hospital and the Center remained unaware of all of the terms of the settlement, until September 26, 1990, well after the Sixth Circuit Court of Appeals denied rehearing to Petitioner. To this date the amount paid in settlement is not known.

granted the Hospital's motion to dismiss the claim of lack of informed consent. On August 11, 1988, the jury returned a verdict against McGee and the Center on the claim of lack of informed consent.

On August 19, 1988, the Center filed a post-trial motion to dismiss, again raising the lack of in personam jurisdiction issue, and, in the alternative, for judgment notwithstanding the verdict. McGee also filed a motion to dismiss for lack of jurisdiction. The district court orally denied the motions.

The damage portion of the trial began on September 1, 1988. On September 2, 1988, the jury returned a verdict awarding $50,000.00 in damages against McGee and the Center. On September 13, 1988, the Center filed a motion for judgment notwithstanding the verdict and to reopen the judgment to grant credit for the amount of the settlement paid by OREA. McGee moved to alter and amend the judgment or, in the alternative, for judgment notwithstanding the verdict. Creech moved for a new trial. The district court denied all of the motions.

Creech, McGee, and the Center then appealed. Creech sought a new trial on the issue of damages, and McGee and the Center sought a dismissal of Creech's claims on the ground that the district court's exercise of jurisdiction over them violated their constitutional right to due process under the Fourteenth Amendment. They asserted that the district court could not exercise jurisdiction over them under the Ohio long-arm statute because they did not have sufficient minimum contacts with Ohio to confer such jurisdiction. McGee and the Center also argued that the damages awarded by the jury should be reduced by the amount of the settlement entered into by Creech with defendants OREA, and Richard Roberts. The Center also argued that it could not be held liable for McGee's negligence on the theory of vicarious

liability because his actions were not within the scope of his employment.

The Sixth Circuit Court of Appeals dismissed Dr. McGee from the case holding he was not subject to the district court's jurisdiction. However, the Sixth Circuit found that the Court did have jurisdiction over the Center under a theory of "agency by estoppel", reasoning that the acts of its "agent", the Oral Roberts Evangelistic Association, created the minimum contacts necessary for the Court to exercise jursidiction over the Center.[9] The Sixth Circuit upheld the judgment against the Center on the theory of vicarious liability, and the jury's damage award was vacated, and the case remanded for a new trial on the damage issue.[10]

REASONS FOR GRANTING THE PETITION

This Petitioner is requesting the Supreme Court to review the Sixth Circuits Court of Appeal's decision in this case for three important reasons. The Sixth Circuit's decision extensively broadens the scope of the "minimum contacts doctrine" announced by this Court in *International Shoe v. Washington,* 326 U.S. 310 (1945) and *Hanson v Denckla,* 357 U.S. 235 (1958) and their progeny, thereby conflicting with the established scope of the doctrine heretofore announced by this Court.

Secondly, the decision is a departure from the established doctrine of "agency by estoppel", and as such calls for an exercise of this Court's power of supervision. Thirdly, and perhaps

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[9]The minimum contact being the broadcast of the "Expect A Miracle" program over the airwaves which was seen by Ohio residents.

[10]The Court also ruled that the Center was entitled to a credit in the amount of the settlement entered into by Creech with OREA, Oral Roberts, and Richard Roberts. See Sixth Circuit Opinion, P. 14; Appendix Page 14a.

most importantly, the impact of the Sixth Circuit's decision on persons and benevolent organizations benefitting from third parties' solicitations for funds is such that, if the decision is upheld, those benefitting from such solicitations will be subject to being haled into court in any area where the solicitation is made, regardless of whether the person or organization authorized or requested such solicitation.

I.

The Sixth Circuit's decision impermissibly broadens the scope of the "Minimum Contacts Doctrine" announced by this Court in *International Shoe v.Washington*, 326 U.S. 310 (1945) and *Hanson v. Denckla*, 357 U.S. 235 (1958) and their progeny, thereby conflicting with the established scope of the doctrine.

The Sixth Circuit Court of Appeals found that the District Court had jurisdiction over the Center by virtue of the fact that OREA, through its "Expect A Miracle" program, broadcast into various states, including Ohio, thereby providing the minimum contact necessary to find in personam jurisdiction.[11] However, the court below, as well as the trial court, misunderstood the concept of the Oral Roberts Ministries, and disregarded the record which reflects the creation of the various legal entities involved with OREA.[12] The court's confusion may well come from the confusion created at the trial court level by the plaintiff continually referring to the "City of Faith" in generic terms. "City of Faith" is a concept created by Oral Roberts and one that he applies to the entire evangelistic program![13] It also refers to the physical loca-

[11] See 6th Circuit Opinion, P. 8; Appendix Page 8a.

[12] Testimony of Ruth Creech, SideBar Conference, Pgs. 96-106; Appendix Page 24a. See also testimony of Mark Swadener, P. 11; Appendix Page 40a.

[13] Testimony of Oral Roberts, August 2, 1988, P. 7; Appendix Page 44a.

tion in Tulsa, Oklahoma from which the entire evangelistic program is run. The "City of Faith" encompasses several different programs and legal entities by which the evangelistic purposes are carried out. It includes Oral Roberts University and campus, the City of Faith Hospital, the City of Faith Medical and Research Center, the Oral Roberts Evangelistic Association, the broadcasting companies which produce and broadcast the different programs of the ministry, and various other entities, all of which make up Oral Robert's concept of the "City of Faith"![14] The plaintiff continually confused and referred to the Hospital and the Research Center as "City of Faith". Plaintiff was even so confused as to bring suit against "City of Faith Clinic" when there was never such an entity.

The concept of the "City of Faith" was put into action by Oral Roberts and others involved in the ministry by forming various legal entities. Oral Roberts Evangelistic Association is the legal entity through which the goals and direction of the entire ministry are steered. The City of Faith Medical and Research Center is a separate, distinct, legal corporation![15]

II.

The Sixth Circuit Court of Appeals improperly applied the doctrine of Agency by Estoppel because the theory was never pleaded nor proved and the record contains no evidence that the legal entity deemed "Principal" by the Court, had a right to control the acts of OREA or made any representations to third parties that OREA was its agent.

The Sixth Circuit based its reasoning on the minimum contacts of the advertising done by the OREA being imputed to the

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[14] Testimony of Oral Roberts, August 2, 1988, P. 11; Appendix Page 44a.

[15] Testimony of Mark Swadener, Pgs. 10-11; Appendix Page 44a.

Center through a theory of "agency by estoppel", reasoning that because the Center knowingly accepted the benefits of the solicitations and did not complain about OREA's activities, it is now estopped to deny its contacts with the forum. The Sixth Circuit also reasoned that the Center's arguments that it was never pleaded or proved that the Center was the principal and OREA the agent is largely irrelevant to the theory of agency by estoppel.[16] It is this holding that most clearly indicates that the Sixth Circuit court has misinterpreted the record made at the trial court level and misapplied the doctrine of agency by estoppel.

To hold that the Center "permitted OREA to solicit patients on its behalf" is to misunderstand the structure of the ministry. And to further hold that "agency by estoppel" is created because the Center received some financial benefits from the solicitations of OREA is to misapply Ohio law, as well as the law of almost all other jurisdictions' on this subject. It is a basic tenet of principal/agency law that an agent lacks control over the acts of its principal. It is also well settled that the principal's right to control the agent is fundamental to the existence of the agency relationship. *National Labor Relations Bd. v Local No. 64, Falls Cities Dist. Council of Carpenters,* 497 F.2d 1335, 1336 (6th Cir. 1974). It is equally well-settled that in an "agency by estoppel", (also referred to in the various jurisdictions as apparent agency, ostensible agency, etc.) the apparent authority must be established by proof of something said or done by *the principal* and cannot be established merely by showing that the agent claimed authority or purported to exercise it. *Moreau v James River-Otis, Inc.,* 767 F.2d 6, 9 (1st Cir. 1985). See also *Wheeler v Puritan Ins. Co.,* 720 P.2d 729 (Okl. 1986) in which the court stated very clearly that "apparent agency develops from the acts of the principal

[16] See 6th Circuit Opinion, P. 8; Appendix Page 8a.

himself and not from the acts of the agent." *Wheeler,* at page 731. Also, an Ohio state court case, *Irving Leasing Corp. v M & H Tire Co.,* 475 N.E.2d 127, 132 (Ohio Ct.App. 1984) holds that an agency relationship created by apparent authority "may also be conferred if the *principal,* intentionally or by lack of ordinary care, causes or allows third persons to act upon the apparent agency relationship". In order to establish such an agency, it must be shown that the principal held the agent out to the public as possessing sufficient authority to act on his behalf and that the person dealing with the agent knew these facts and, acting in good faith, had reason to believe the agent possessed the necessary authority. *Logsdon v ABCO Constr. Co.,* 103 Ohio App. 233, 241-243, 141 N.E.2d 216 1956). The burden of proving the existence of such agency rests upon the party asserting the agency. *Irving* at page 132.

The Center had no control, nor right to control, any activities of OREA. Moreover the Center made no representations, nor in any manner manifested its consent to the solicitations of the Oral Roberts Evangelistic Association. Additionally, OREA bore the total cost of the "Expect a Miracle" program.[17] The only evidence on the record which relates to control is evidence which suggests that OREA could have exerted control over the Center, since OREA gratuitously provided periodic funds to the Center. There is no evidence that the Center controlled the time, place, or manner of the OREA solicitations, or that the Center had any say one way or another in what type of solicitations were being made in its behalf, or whether it could have stopped the broadcasts, or declined to participate in the "Expect a Miracle" programs which included references to the Hospital and Center. There is no evidence that the Center had any say one way or the other

[17] Testimony of Mark Swadener, P. 8; Appendix Page 38a.

in whether it was given any financial assistance from OREA. The record not only fails to support a finding that the Center was the *principal* of OREA, but the record clearly shows that any manifestations of representations made to third parties were made by OREA, Oral Roberts and Richard Roberts, who are in fact the defendants who were originally brought in on the fraud actions to confer in personam jurisdiction on the Ohio federal court. To impute those contacts to the Center is such a departure from established principal/agency law as to require this Honorable Court's supervision.

III.

The minimum contacts necessary to empower an Ohio Federal District Court with personal jurisdiction to hear a medical malpractice suit arising in Oklahoma have not been met, and Defendant's right to Due Process under the 14th Amendment has been violated.

Basing jurisdiction upon a contact by a separate corporate entity, OREA, and imputing that contact to a corporate defendant who had no contact with the forum is to impermissibly broaden the doctrine of "minimum contacts" as set out by this Court in *International Shoe v Washington,* id., *Hanson v Denckla,* id., *World-Wide Volkswagen v Woodson,* 444 U.S. 286 (1980), *Burger King Corp. v Rudzewicz,* 471 U.S. 462 (1985), and *Asahi Metal Industry Co., LTD. v Superior Court of California, Solano County,* 480 U.S. 102, (1987). The Sixth Circuit's broadening of the doctrine of minimum contacts to this extent is impermissible because the application of the doctrine in this case takes it beyond the constitutional touchstone of the determination of whether an exercise of personal jurisdiction comports with due process, which remains "whether the defendant purposefully established

'minimum contacts' in the forum State." *Burger King Corp. v Rudzewicz,* 471 U.S. 462, 474 (1985), quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 316 (1945).

The record is clear that the Center had no contacts with the State of Ohio. It had never done business in that state, had never been licensed in that state, had never maintained a corporate presence within that state and had no contact with the residents of Ohio within the state. Further, none of the requirements of the Ohio long-arm statute were met. The only possible section of the Ohio Long-Arm Statute which may be applicable is Ohio Revised Code, § 2307.382(A)(4):

(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

The record is clear that the only possible clause that might arguably be applicable is subparagraph (4) of § 2307.382. However, the record is also clear that the only entities responsible for the contacts with Ohio were those evangelistic Defendants (OREA, Oral Roberts, and Richard Roberts) who were sued in fraud and who entered into the secret settlement agreement. The record is clear that the City of Faith Medical and Research Center is a separate corporation, and it is equally clear that the Center did not solicit business in Ohio, nor did it engage in any other, much less persistent course of conduct in Ohio; it did not render any services in the state of Ohio, nor did it derive substantial revenue from services rendered in that state. Plaintiff offered no evidence that would trigger the exercise of personal jurisdiction over the Defendant Center under the quoted long-arm statute. Plaintiff utterly failed to establish any conduct of the Center that falls within the purview of the statute.

Before jurisdiction may be exercised over a particular defendant, there must be some act by that defendant by which that defendant purposefully avails itself of the privilege of conducting activities within the forum State. In *Hanson v Denckla,* 357 U.S. 235 (1958), the Supreme Court stated:

> The unilateral activity of those who claim some relationship with a non-resident defendant cannot satisfy the requirement of contact with the forum state — It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its law.

Hanson, at page 253. The unilateral decisions of OREA to broadcast to Ohio, information about the City of Faith Medical and Research Center, along with other aspects of the ministry, is not an act of the Center. Although the Center did receive charitable donations from OREA, presumably from funds it acquired from its unilateral activities, this alone does not constitute "purposeful availment" as required by the Supreme Court.

Further, even if the evidence supported the view that the Defendant Center had advertised in Ohio, the Sixth Circuit erred in concluding that such activity was sufficient to meet the requirement of the long-arm statute that the Plaintiff's injury arise out of the Defendants' transaction of business within Ohio. The Southern District of Ohio, in *Coleman v Chen,* 712 F.Supp. 117 (U.S.D.C. Ohio 1988) addressed this very issue. In that case, an Ohio resident brought a personal injury action against a motel franchisee and franchisor for injury she sustained while a guest at a California motel. The plaintiff argued that the Court had personal jurisdiction over the franchisee because the franchisor advertised in Ohio, and because the franchisee, a California motel, gained some financial benefit from the advertising activities of

the franchisor. The Court ruled that the advertising of the franchisor did not constitute minimum contacts under the Constitution to give the court personal jurisdiction over the franchisee, stating:

> There are two basic problems with regard to basing jurisdiction upon advertising. First, the Ohio courts have been hesitant to base jurisdiction upon mere solicitation. [citations omitted.] Mere solicitation is not sufficient to constitute "transacting any business" as required by Ohio Rev. Code § 2307.382(A)(1). [citations omitted.] Second, it cannot be said that Plaintiff's personal injury action arose from any solicitation by Defendants Chen. The circumstances which may have caused her injury are unrelated to the solicitation. Plaintiff's injury did not arise from Defendant Chens' advertising, but (allegedly) from the condition of the Pasadena Holiday Inn's parking lot. Both the First and Eighth Circuits have considered the question of whether personal injury actions can arise from the mere solicitation of business. Both circuits concluded that '[t]his connection is too tenuous.' . . . This Court is in agreement with the holding of the First and Eighth circuits and thus concludes that Plaintiff has failed to meet the requirements of Ohio's long-arm statute.

Coleman, at page 122. Those two basic problems recognized in the *Coleman* case exist in the matter at bar. Mere solicitation by another alone is not sufficient. In the case at bar we do not even have a relationship as close as a franchisor/franchisee contractual relationship between the parties. We have only independent corporations, with the act of one being imputed to the other to create the minimum contact necessary for the court to exercise in personam jurisdiction over the non-acting corporation. This is clearly beyond the due process standard enunciated previously by this court.

The second problem recognized in Coleman, and character-

ized as the tail wagging the dog, is likewise present herein. For the acts or representations to create an agency by estoppel, the acts/representations have to be committed by the principal. The record is totally clear that the solicitation and advertising was done by OREA, not by the Center.

The claims of alleged injuries from fraud which Plaintiff claimed arose from the broadcast were settled by Plaintiff and the evangelistic defendants in a secret agreement, which resulted in a directed verdict on the fraud claims. There is no dispute that in the present case, the plaintiff's medical injuries did not arise from the broadcast of the "Expect a Miracle" program, but rather out of the alleged malpractice in Oklahoma.

IV.
POLICY REASONS

The most important reason the Court should review this decision is the effect it will have nationwide on organizations which receive charitable donations solicited from the public by separate entities. The continuing expansion of the use of interstate communications, and the availability of the means to do so by charitable associations having diverse interests, which donate funds to various institutions will subject those institutions accepting the funds to personal jurisdiction in potentially any court in the nation.

The decisions of this Court in recent years have drawn clear parameters around in personam jurisdiction enabling a person to reasonably anticipate what activities may subject them to jurisdiction in a given court. Such mandates have resulted in national uniformity in ruling upon such issues as well as providing a degree of stability and security in the formation of business interests and relationships. Through this Court's decisions in *Worldwide*

Volkswagen, Hanson, Burger King, and *Asahi,* a person/entity could anticipate it would not be burdened with litigation in distant jurisdictions by the unilateral action of one with which it has a relation but no right to control. If the Decision herein by the Sixth Circuit is allowed, no one accepting charitable donations can be so assured in the future and the previous efforts of this Court will be undermined at the expense of judicial economy and uniformity.

This Decision not only wreaks havoc with the long standing due process standards of in personam jurisdiction enunciated by this Honorable Court, but also creates confusion as to the predictability of federal jurisdiction, encourages forum shopping, creates the potential of multiplicity of lawsuits[18], thereby wasting judicial resources, and most importantly, creates a substantial burden on the defendant having to defend a lawsuit in a distant jurisdiction with which it has had no contact.

CONCLUSION

For the reasons stated above, this Petition for Certiorari should be granted. Petitioner reiterates that the decision rendered herein impermissibly broadens the doctrine of minimum contacts by providing a basis of personal jurisdiction beyond that which is acceptable under the Due Process rights of the Petitioner. Further, the Sixth Circuit's improper application of the theory of agency by estoppel should not be allowed to impute minimum contacts to the Petitioner. This matter should be remanded to the Sixth Circuit for the determination that the Ohio Federal Court did not have proper personal jurisdiction over the City of Faith

[18] In this case, an identical malpractice case was filed in the Northern District of Oklahoma, Case No. 87-C-1012-B, filed December 3, 1987, and which remains to date.

Medical and Research Center, therefore rendering the verdict and judgment against Petitioner void. This action could then be properly disposed of in the judicial forum which does have proper jurisdiction as well as a real and legitimate interest in such claims.

Respectfully submitted,

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APPENDICES

RECOMMENDED FOR FULL TEXT PUBLICATION
See Sixth Circuit Rule 24

Nos. 88-4180/89-3096

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RUTH H. CREECH,
Plaintiff-Appellee, Cross-Appellant,

v.

ORAL ROBERTS, RICHARD ROBERTS, CITY OF FAITH HOSPITAL, ORAL ROBERTS EVANGELISTIC ASSOCIATION, BRENT BENNETT, M.D., MICHAEL LAUGHLIN, M.D.,
Defendants,

CITY OF FAITH MEDICAL AND RESEARCH CENTER, MICHAEL MCGEE, M.D.,
Defendants-Appellants, Cross-Appellees.

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed July 13, 1990

Before: GUY and BOGGS, Circuit Judges; and COHN, District Judge*.

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*Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

COHN, District Judge, delivered the opinion of the court, in which BOGGS, Circuit Judge, joined. GUY, Circuit Judge, (pp. 17-18) delivered a separate opinion concurring in part and dissenting in part.

COHN, District Judge. The plaintiff and two of the defendants appeal from the judgment in this medical malpractice action, brought pursuant to Oklahoma law. For the reasons that follow, we affirm in part, vacate in part, and remand for a new trial on the issue of damages.

I.

In the beginning, plaintiff-appellee and cross-appellant Ruth Creech (Creech), an Ohio resident, filed this action in state court in Ohio, raising medical malpractice and lack of informed consent claims against the City of Faith Hospital (the Hospital), the City of Faith Clinic (the Clinic), defendant-appellant and cross-appellee the City of Faith Medical and Research Center (the Center), and physicians Brent Bennett, Michael Laughlin, and defendant-appellant and cross-appellee Michael McGee (McGee). All of the claims arose out of injuries incurred while Creech was a patient at the Hospital in Tulsa, Oklahoma. The Hospital removed the action to federal court. Creech subsequently amended her complaint, adding defendants Oral Roberts and Richard Roberts, and raised fraud claims against them. After further discovery, Creech again amended her complaint, adding the Oral Roberts Evangelical Association (OREA) as a defendant, removed the Clinic as a defendant, and raised a fraud claim against OREA.[1]

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[1]Although Creech's Second Amended Complaint only inferentially raises fraud claims against the Center and the Hospital, the text of the settlement agreement and Creech's trial brief show that, by the time of the trial, the parties did not dispute that the Center and the Hospital were defendants in the fraud action as well.

In addition, the Court notes that the Clinic was dismissed as a defendant because there is no such legal entity as the "City of Faith Clinic." Apparently, the City of Faith Medical and Research Center is referred to frequently as "the Clinic."

The district court bifurcated trial into a liability phase and a damages phase. Just prior to the beginning of the liability phase, Creech voluntarily dismissed the claims against Michael Laughlin and Brent Bennett. The trial began August 1, 1988. Seven days later, the district court granted a motion for a directed verdict on the issue of fraud and directed the jury to find in favor of the defendants Oral Roberts, Richard Roberts, OREA, the Hospital, and the Center. In exchange for a covenant not to appeal the directed verdict, OREA paid Creech valuable consideration and agreed to indemnify her against any attempts by the Hospital or the Center to collect her outstanding hospital bills.[2] On August 10, 1988, near the completion of the liability phase of the trial, the district court granted the Hospital's motion to dismiss the claim of lack of informed consent. On August 11, 1988, the jury returned a verdict against McGee and the Center on the claim of lack of informed consent.

On August 19, 1988, the Center filed a motion to dismiss for lack of jurisdiction or, in the alternative, for judgment notwithstanding the verdict. McGee also filed a motion to dismiss for lack of jurisdiction. The district court orally denied the motions.

The damages portion of the trial began on September 1, 1988. On September 2, 1988, the jury returned a verdict awarding $50,000 in damages against McGee and the Center. On September 13, 1988, the Center filed a motion for judgment notwithstanding the verdict and to reopen the judgment

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[2]As part of the settlement agreement, Creech agreed not to disclose its terms. This shroud of secrecy was maintained rigorously throughout the trial by the district court, so much so that the Hospital and the Center remain unaware of all of the terms of the settlement. While we make no ruling on the propriety of the district court's approach to this matter, we note that keeping the terms of the settlement secret from other parties undoubtedly complicated matters and may have precipitated some of the errors that we now address.

to grant credit for the amount of the settlement paid by OREA. McGee moved to alter and amend the judgment or, in the alternative, for judgment notwithstanding the verdict. Creech moved for a new trial. The district court denied all of the motions.

Creech, McGee, and the Center now appeal. Creech seeks a new trial on the issue of damages, arguing that the amount of the award is contrary to the great weight of the evidence and so inadequate as to shock the conscience. She also claims that the inadequacy of the verdict can be linked to the improper questions and remarks of McGee's counsel and to the district court's ruling excluding any mention of her hospital bill from the trial.

Both McGee and the Center seek a dismissal of Creech's claims on the ground that the district court's exercise of jurisdiction over them violated their constitutional right to due process under the Fourteenth Amendment. They assert that the district court could not exercise jurisdiction over them under the Ohio long-arm statute because they did not have sufficient minimum contacts with Ohio to confer such jurisdiction. Both also argue that the damages awarded by the jury should be reduced by the amount of a settlement entered into by Creech with defendants OREA, Oral Roberts, and Richard Roberts. Finally, the Center argues that it cannot be held liable for McGee's negligence on the theory of vicarious liability because his actions were not within the scope of his employment.

For the reasons stated below, McGee is dismissed from the case, and the matter is remanded to the district court for a new trial on the issue of damages.

II.

A.

Creech is a citizen and resident of the state of Ohio. McGee and the Center are citizens and residents of the state of Okla-

homa. Both have at all times denied that they were subject to the district court's in personam jurisdiction. Therefore, the Court will address the assertions of both defendants as to personal jurisdiction in a single discussion.

Creech's cause of action arose from medical care and treament she received in Tulsa, Oklahoma, at the Center. Her cause of action against McGee was based on an alleged failure to obtain informed consent prior to performing surgery, and her cause of action against the Center was based on a vicarious liability theory. McGee provided no medical care or treatment to Creech in Ohio, has never practiced medicine in Ohio, is not licensed to practice medicine in Ohio, and has not maintained any office, facility, or business within Ohio. The Center provided no treatment to Creech in Ohio, has not mailed information to or received mail from Ohio, or had agents or employees physically present in Ohio.

Creech initially became aware of the Hospital and the Center through the "Expect a Miracle" television program featuring Oral and Richard Roberts. Through the program, Oral Roberts, the spokesperson for OREA, the Hospital, and the Center, invited people to come from around the country, as well as from other countries, to the Hospital and the Center for treatment. Each broadcast would begin by showing the City of Faith logo above the words "City of Faith." During the broadcasts, the words "City of Faith Clinic Appointments" and a telephone number appeared on the television screen, accompanied by various pictures of the facilities at the Hospital and the Center.

The "Expect a Miracle" broadcasts solicited patients and funds for the Hospital and the Center. Ohio was one of the states receiving the broadcasts, and, in fact, Ohio residents other than Creech were convinced to go to the Hospital and the Center for treatment. Creech testified at trial that the broadcasts made her aware of the Hospital and the Center and provided her with information that enabled her to con-

tact the Center and make an appointment for a medical examination.

B.

In determining whether it can assert personal jurisdiction over a nonresident defendant in a diversity case, a district court must apply the law of the state in which it sits, subject to due process limitations. *Welsh v. Gibbs,* 631 F.2d 436, 439 (6th Cir. 1980), *cert. denied,* 450 U.S. 981 (1981). Because Creech chose Ohio as the forum for her cause of action, the district court derived its jurisdiction from the provisions of Ohio's long-arm statute, Ohio Rev. Code § 2307.382 (Anderson 1988 & Supp. 1989). That statute confers on the district court the ability to exercise specific or limited personal jurisdiction over a nonresident defendant where the cause of action arises out of an act or acts creating one of several designated relationships.

Here, Creech argues that the district court properly exercised specific jurisdiction on the grounds that the Center transacted business in Ohio, Ohio Rev. Code Ann. § 2307.382(A)(1) (Anderson 1988 & Supp. 1989).[3] The question thus becomes whether the broadcasts televised in Ohio constitute "transacting business" for purposes of the statute. Because it is a settled proposition of Ohio law that the portion of the long-arm statute cited above was intended to extend to the constitutional limits of due process, we must determine whether a decision that the Center and McGee transacted

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[3]Creech also argues that the district court properly invoked pendent party jurisdiction to create jurisdiction over McGee. We disagree. Pendent party jurisdiction involves the issue of whether a court may exercise jurisdiction over a separate party when the court lacks *subject matter jurisdiction* over that party. *See Aldinger v. Howard,* 427 U.S. 1 (1976). The concept is entirely unrelated to personal jurisdiction. Therefore, the Court must determine whether any other basis for the district court's exercise of personal jurisdiction over McGee exists.

business in Ohio would violate due process. *See In-Flight Devices Corp. v. Van Dusen Air, Inc.*, 466 F.2d 220, 224-25 (6th Cir. 1972). To comport with due process, three criteria must be met:

> First, the defendant must purposely avail himself of the privilege of acting in the forum state or causing a consequence in the forum state. Second, the cause of action must arise from the defendant's activities there. Finally, the acts of the defendant or consequences must have a substantial enough connection with the forum state to make the exercise of jurisdiction over the defendant reasonable.

LAK, Inc. v. Deer Creek Enterprises, 885 F.2d 1293, 1299 (6th Cir. 1989), *cert. denied*, 108 L. Ed. 2d 764 (1990) (citing *Southern Machine Co. v. Mohasco Industries*, 401 F.2d 374, 381 (6th Cir. 1968)).

McGee and the Center argue that none of the criteria applies to them because they were never present in the state of Ohio. However, the Supreme Court has held that parties that reach out beyond one state to create relationships with citizens of another are subject to regulation and sanctions in the other state for the consequences of their activities, regardless of whether they were actually present in that state. *Burger King v. Rudzewicz*, 471 U.S. 462, 473 (1985). Advertising is among the activities that constitute "reaching out" to forum state residents. *See LAK*, 885 F.2d at 1300; *see also Shute v. Carnival Cruise Lines*, 1990 U.S. App. LEXIS 2540 (9th Cir.)(holding that cruise line that advertised, provided brochures to travel agents, and periodically held seminars for travel agents in Washington was subject to personal jurisdiction there). OREA, through the "Expect a Miracle" program, clearly reached out to the forum state, but the district court's jurisdiction over OREA is not questioned. Instead, we must decide whether OREA's activities constitute purposeful availment in Ohio or reaching out into Ohio by McGee and by the Center.

The Court has been unable to find, and Creech does not cite, any case in which a trial court has asserted personal jurisdiction over a nonresident doctor who committed a tortious act outside the forum state — even where the doctor worked for a hospital that advertised in the forum state. Indeed, every case reported seems to reach the opposite result. *See, e.g., Pijanowski v. Cleveland Clinic Foundation,* 635 F. Supp. 1435, 1436 (E.D. Mich. 1986); *Lemke v. St. Margaret Hosp.,* 594 F. Supp. 25, 27 (N.D. Ill. 1983). Therefore, the district court's assertion of personal jurisdiction over McGee was improper, and the claim against him must be dismissed.

In contrast, because OREA, through Oral and Richard Roberts, advertised on behalf of the Center by broadcasting the "Expect a Miracle" program, we find that the Center purposefully availed itself of the privilege of acting in Ohio. In its brief, the Center asserts that it has never been "charged" with being a principal for OREA and that funds solicited through the "Expect a Miracle" program were received by OREA. These arguments are largely irrelevant. Whether or not the Center officially or unofficially agreed to have OREA act as its agent, it is clear that the Center permitted OREA to solicit patients on its behalf through broadcasts of the "Expect a Miracle" program in Ohio. These were not the sort of "random," "fortuitous," or "attenuated" contacts that have been held to be insufficient to warrant jurisdiction. *See, e.g., World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 299 (1980). The Center knowingly accepted the benefits of these solicitations and never complained about OREA's activities. This created an agency by estoppel. *See Blackwell v. UAW,* 458 N.E.2d 1272, 1275 (Ohio Ct. App. 1983). The Center cannot now deny its contracts with the forum by claiming that OREA was a stranger to it.

The next factor to be considered is whether Creech's cause of action arose from the Center's activities in the forum state. An action will be deemed not to have arisen from the defendant's contacts with the forum state only when they are unre-

lated to the operative facts of the controversy. *Third Nat'l Bank v. Wedge Group Inc.*, 882 F.2d 1087, 1091 (6th Cir. 1989), *cert. denied*, 110 S. Ct. 870 (1990) (citing *Southern Machine*, 401 F.2d at 384 n.29). That clearly was not the case here. If the "Expect a Miracle" program had not been televised in Ohio, Creech would never have become interested in seeking healing at the Center, would never have seen the phone number to call to make an appointment at the Center, and would never have undergone surgery at the Center. Because her exposure to the program brought her into contact with the Center, the Court finds that her cause of action did arise from the Center's activities in Ohio.

Finally, we must determine whether the district court's exercise of jurisdiction over the Center was reasonable.

> [W]here a defendant who purposefully directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable. Most such considerations usually may be accommodated through means short of finding jurisdiction unconstitutional.

Burger King, 471 U.S. at 477. Moreover, when the first two factors of the *Southern Machine* test are met, only the unusual case will not satisfy the third factor. *Wedge*, 882 F.2d at 1092. The Center presents no other considerations suggesting that the district court's exercise of jurisdiction was unreasonable. Indeed, because it solicited funds and patients from Ohio, the Center should have expected to be subject to the jurisdiction of Ohio courts. It cannot be heard now to complain of surprise at such a result.

III.

Next, the Center argues that it cannot be held vicariously liable for the acts of a physician, McGee, under the facts of this case. Because the district court failed to instruct the jury

as to whether the alleged malpractice was within the scope of McGee's employment, the Center asserts that the district court effectively directed a verdict against it. We disagree.

Despite citations to the law of numerous jurisdictions and a lengthy discourse on principles of the law of agency, the focal point of the Center's brief on this issue is *Smith v. Saint Francis Hospital,* 676 P.2d 279 (Okla. Ct. App. 1983).[4] The district court relied on *Smith* in instructing the jury, and the Center desperately tries to distinguish *Smith* from the current matter. *Smith* stands for the proposition that a hospital is vicariously liable for the acts of a staff physician when the patient comes to the hospital as an entity seeking medical services and has no pre-existing relationship with the physician. *Id.* at 282-83. Here, Creech came to the Center, not to a specific doctor. She had no prior relationship with McGee. The Center urges a distinction on the ground that McGee's actions were medical decisions, implicating him alone. However, the misdiagnosis that occurred in *Smith* was also a medical decision. That fact had no effect on the extent of the hospital's liability. Thus, no matter how hard the Center tries to define the scope of McGee's employment to exclude acts that might subject it to liability, it cannot do so under *Smith.* The district court's decision on this issue is affirmed.

IV.

Finally, the Center asserts that the district judge wrongfully denied it a credit in the amount of the settlement agreed to by defendants Oral Roberts, Richard Roberts, and OREA against the amount of the verdict returned by the jury. Oklahoma law discharges joint tortfeasors who settle the claims against them from liability for contribution. Okla. Stat. tit.

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[4]Based on a conflict of laws analysis, the district court determined that it was required to apply Oklahoma law to Creech's medical malpractice claims. None of the parties disputes this determination.

12 § 832(H)(2) (1988). However, joint tortfeasors who go to trial on claims arising from the same injury retain a right of set-off against the amount of the settlement:

> When a release, covenant not to sue or a similar agreement is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death: . . . it reduces the claim against others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater.

Okla. Stat. tit. 12 § 832(H)(1) (1988). Based on this statute, the Center asserts a right to set off the jury verdict against the amount of the settlement. Creech disputes that right. Both parties agree that interpretation of the statute is governed by *In Re Jones*, 804 F.2d 1133 (10th Cir. 1986). *Jones* provides that the statute applies where three conditions are met: 1) there is a release or covenant not to sue given to one of two or more persons; 2) the multiple parties are liable in tort; and 3) they are liable for the same injury. *Id.* at 1140. Both parties also agree that the first two conditions are met in this case. Therefore, the Court need only decide if the Center is liable for the same injury as Oral Roberts, Richard Roberts, and OREA.

We conclude that the injuries are not separate and distinct. In *Jones*, the Court of Appeals for the Tenth Circuit held that joint tortfeasors' actions leading to the destruction of an oil well were all part of the same injury and that contribution was appropriate. *Id.* at 1143. Section 832(H) does not require that the parties act in concert in order to be liable as multiple tortfeasors, as long as they cause or contribute to the same injury. *Id.* The *Jones* court referred to two medical malpractice cases as illustrations of what constitutes the same injury under Oklahoma law. In one, negligent surgery was performed by two doctors, and a third doctor's attempt to rectify

the complications caused serious injury. The plaintiff sued all three doctors and the hospital. The hospital settled prior to trial, and the court deducted the settlement amount from the verdict against the doctors. *Id.* at 1142. In the second case, litigated before the passage of § 832(H), the court concluded that the injury caused by the initial tortfeasor was the proximate cause of the subsequent unskillful medical treatment and held that there existed a proper relationship for the right of contribution. *Id.* at 1143.

From these examples, it is clear that the fraud claims settled against Oral Roberts, Richard Roberts, OREA, the Hospital, and the Center were part of the same injury as the lack of informed consent claims brought against the Hospital, the Center, and McGee. Until the time that the fraud claims were settled, Creech maintained that all of the fraud defendants caused and contributed to her injuries.

Essentially, Creech's theory of the case, though never proven in its entirety, was as follows: The City of Faith Hospital and Medical and Research Center were suffering financial difficulties. To generate income for them, OREA decided to solicit contributions and patients for the City of Faith facilities. To increase contributions and entice patients to travel to the City of Faith, the "Expect a Miracle" programming was produced. Oral Roberts and Richard Roberts appeared on the programs claiming that those who went to the City of Faith would receive a special kind of healing treatment, augmented by the power of God. Creech saw the programs and believed that she would experience God's healing power if she went to the City of Faith. She sought treatment there and was told that she needed surgery. Ultimately, surgery was performed without her being fully informed of other treatment options. This behavior by the doctors was allegedly part of the fraudulent plan, never proven at trial, to keep patients at the City of Faith in order to squeeze as much money out of them as possible.

Given the manner in which Creech's claims intertwine in her theory of the case, there can be no doubt that both were part of the same injury. Therefore, Oklahoma law entitles the Center to a set-off in the amount of the settlement.

V.

Creech appeals only the jury verdict on the issue of damages. She claims that the trial court erred in denying her motion for a new damages trial for several reasons. She asserts that the $50,000 awarded by the jury was grossly inadequate and attributes the inadequacy of the verdict to the short time spent deliberating by the jury, improper questioning and improper statements made during closing argument by McGee's counsel, and the trial court's improper exclusion of Creech's hospital bill as an item of damages and a subject for closing argument. Because the Court agrees that the trial court improperly excluded Creech's hospital bill from the evidence as to the injuries she suffered, it need not reach any of the other issues raised in her appeal.

A.

The tort of lack of informed consent requires proof of three elements: nondisclosure, causation, and injury. *Smith v. Reisig,* 686 P.2d 285, 288 (Okla. 1984). In the liability phase of the trial, the jury determined that Creech had been the victim of nondisclosure and that she would not have consented if she had been adequately informed. This finding shows that Creech successfully proved the first two elements of the tort. During the damages portion of the trial, Creech sought to prove the extent of her injuries resulting from the lack of informed consent. We find that the district court erroneously inhibited her ability to do so by excluding her hospital bills from evidence.

"[W]here liability is premised upon the physician's failure to inform of non-surgical alternatives, one of the elements of damage is the injury and expense caused by the surgery

itself, including any complications which may arise, whether resulting from defective treatment or not." *Id.* Thus, Creech's hospital expenses would serve as evidence of some of the key elements of her damages. The hospital bills are the best evidence of the expenses attributable to her surgery. The magnitude of the bills also reflects the magnitude of the complications that Creech suffered as a result of the surgery performed. Under Oklahoma law, if a physician fails to disclose alternatives to surgery, the patient's consent is invalid, and the physician is to be held responsible for the consequences. *Id.* at 289. Creech should have been permitted to make the jury aware that those consequences included her being billed for a six-week hospital stay rather than the 10-day hospital stay normally required for the surgical procedure performed.

The district court decided to exclude Creech's hospital bills from the evidence in the damages phase because of the settlement agreement reached with OREA, Oral Roberts, and Richard Roberts. That agreement included a hold harmless provision in which OREA, Oral Roberts, and Richard Roberts agreed to indemnify Creech in the event that the Hospital or the Center tried to collect on the outstanding bills. Given the hold harmless provision, the district court reasoned that Creech's hospital bills could play no part in the damages phase of the trial because Creech was not entitled to recover twice for the same element of damages. This concern is renewed in the Center's response to Creech's appellate brief.

Based on our interpretation of Okla. Stat. tit. 12 § 832(H)(1), *supra*, such fears of double recovery by Creech are unfounded. Because the Center is entitled to a set-off of the settlement amount against any jury verdict, double recovery is impossible. The value of the hold harmless agreement must be deducted from any damages awarded. Therefore, we conclude not only that Creech's hospital bills are necessary to prove an essential element of her lack of informed consent

case under Oklahoma law, but also that no plausible argument supports their exclusion.

B.

"[N]o error in the admission or exclusion of evidence is ground for reversal or granting a new trial unless refusal to take such action appears to the court to be inconsistent with substantial justice." *McGowan v. Cooper Indus., Inc.*, 863 F.2d 1266, 1271 (6th Cir. 1988) (quoting *TCP Indus., Inc. v. Uniroyal, Inc.*, 661 F.2d 542, 551 (6th Cir. 1981)). Under this standard, we believe that Creech is entitled to a new trial on the issue of damages. Her appellate brief lists her actual damages as $78,711.38. She reaches this figure by adding her hospital bills ($55,000), her post-discharge medical expenses ($6,045.50), and her expected costs of pain medication for the rest of her life ($17,665.88). The jury returned a verdict awarding her $50,000, an amount less than the total of the hospital bills. Given the amount of Creech's actual damages and the fact that she may be entitled to compensation for pain and suffering, this is clearly an unacceptable result. Thus, substantial justice requires that we vacate the damages award and remand for a new trial.

VI.

As noted above, Creech's settlement agreement with OREA, Oral Roberts, and Richard Roberts provides that its terms must be kept secret. Out of necessity and upon the request of this Court, Creech has disclosed all of the terms of the agreement except for the amount of the settlement. That information is contained in a district court transcript currently subject to a protective order. We have not needed to lift that order to resolve the issues raised on appeal and do not do so now. However, we cannot envision how the district court will be able to conduct a new trial on the issue of damages without revealing this information to the Center. It will be almost impossible to set off the new verdict against

the settlement amount *and* keep the settlement amount secret. Obviously, no one other than the Center needs to know about the size of the settlement, and that information probably would not be needed until the post-trial stage. While we leave the resolution of this matter to the judgment of the district court, we note that an unreasonable emphasis on keeping secrets from the Center is likely only to make the new trial more awkward and increase the chances for error.

VII.

In light of the foregoing, McGee is dismissed from the case because he was not subject to the district court's jurisdiction. The judgment against the Center on the theory of vicarious liability stands. The jury's damages award is vacated, and the case is remanded for a new trial on that issue. Once a verdict is reached, the Center is entitled to a credit in the amount of the settlement entered into by Creech with OREA, Oral Roberts, and Richard Roberts.

GUY, Circuit Judge, **concurring in part and dissenting in part.** I join Judge Cohn's thorough and well-reasoned resolution of each issue raised by the parties except personal jurisdiction. With regard to personal jurisdiction, I would hold that both Dr. Michael McGee and the City of Faith Medical and Research Center (the Center) have waived the defense by failing to seek dismissal on such a theory in timely fashion. Therefore, I would remand the plaintiff's claims against both Dr. McGee and the Center for a new trial on damages.

Defendants McGee and the Center listed the absence of personal jurisdiction among the affirmative defenses in their answers to the plaintiff's original and amended complaints. Nevertheless, they did not formally assert lack of personal jurisdiction as a basis for dismissal until they filed their motions following the trial as to liability, more than 18 months after the plaintiffs commenced this action.[1] Federal Rule of Civil Procedure 12(h)(1) provides that the lack of personal jurisdiction defense "is waived . . . if it is neither made by motion under [Rule 12] nor included in a responsive pleading or an amendment thereof . . . ." Thus, the defendants' references in their answers to the absence of personal jurisdiction enabled them to avoid waiving personal jurisdiction under Rule 12(h).

Rule 12(h), however, "sets only the outer limits of waiver; it does not preclude waiver by implication." *Marquest Medical Prods., Inc. v. Emde Corp.*, 496 F. Supp. 1242, 1245 n.1 (D. Colo. 1980); *cf. also United States v. Gluklick*, 801 F.2d 834, 837 (6th Cir. 1986) (" '[I]n personam jurisdiction may be obtained by actions of a party amounting to a waiver, and a court has jurisdiction to enter an order finding a waiver."),

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[1]The Center did mention the absence of personal jurisdiction in the course of moving for a directed verdict, but did not formally pursue the issue at that juncture because the district court commented that Oral Roberts' solicitations should be attributed to the Center for the purpose of personal jurisdiction.

cert. denied, 480 U.S. 919 (1987). Even when a defendant has asserted a lack of personal jurisdiction in an answer, "[t]here are limits in the extent to which a defendant can actively litigate a case without waiving defenses of personal jurisdiction and improper venue." *Reliable Tire Distrib., Inc. v. Kelly Springfield Tire Co.,* 623 F. Supp. 153, 155-56 (E.D. Pa. 1985); *cf. also Marcial Ucin, S.A. v. SS Galicia,* 723 F.2d 994, 997 (1st Cir. 1983) ("[I]f defendant appears, a subsequent contest of the court's jurisdiction must be timely."). As the court explained in *Burton v. Northern Dutchess Hosp.,* 106 F.R.D. 477 (S.D.N.Y. 1985), "by asserting the defense of lack of [personal] jurisdiction in their answers[,]" the defendants "do not preserve the defense in perpetuity." *Id.* at 481.

In this case, I believe that Dr. McGee and the Center have waived the defense of personal jurisdiction by failing to seek dismissal on that basis until after the jury returned an adverse verdict as to liability. By delaying his challenge to personal jurisdiction, Dr. McGee has received two opportunities to litigate the question of liability on the merits. He has defended on the merits in Ohio and lost, but his subsequent attack upon the district court's exercise of personal jurisdiction, which has resulted in the invalidation of the verdict in favor of the plaintiff, forces the plaintiff to file a second action (presumably in Oklahoma) in order to obtain redress.[2] I find this sort of gamesmanship impermissible, and would therefore hold that waiver prevents a defendant from raising the issue of personal jurisdiction once a determination of liability on the merits is reached.

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[2]Such delayed motions generate difficulties above and beyond impairment of the efficient operation of the judicial system. As the First Circuit has observed, permitting defendants to file delayed motions for dismissal based upon the absence of personal jurisdiction may create statute of limitations problems for plaintiffs whose original actions are dismissed years after commencement in response to such motions. *See Marcial Ucin,* 723 F.2d at 997.

United States Court of Appeals

FOR THE SIXTH CIRCUIT

FILED

No. 88-4180/89-3096

JUL 13 1990

LEONARD GREEN, Clerk

RUTH H. CREECH,

Plantiff-Appellee,
Cross Appellant,

v.

ORAL ROBERTS, et al.,

Defendants,

CITY OF FAITH MEDICAL AND RESEARCH CENTER; MICHAEL McGEE, M.D.,

Defendants-Appellants,
Cross Appellees.

Before: GUY AND BOGGS, Circuit Judges; and COHN, District Judge.

JUDGMENT

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said district court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that defendant McGee is dismissed; the judgment against defendant Center on the theory of vicarious liability is affirmed; the jury's damages award is vacated; the case is remanded consistent with the opinion.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk
s/s Leonard Green

Issued as Mandate: September 17, 1990

A True Copy.

Attest:

s/s Valen. Fields

FILED

SEP 6 1990

LEONARD GREEN, Clerk

Nos. 88-4180/89-3096

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RUTH H. CREECH,
Plaintiff-Appellee/Cross-Appellant,

vs.

ORDER

CITY OF FAITH HOSPITAL, ET AL.,

Defendants,

CITY OF FAITH MEDICAL AND RESEARCH CENTER AND MICHAEL MCGEE, M.D.,

Defendants-Appellants/Cross-Appellees,

Before: GUY AND BOGGS, Circuit Judges; and COHN, District Judge

Upon consideration of the petition for rehearing filed by the appellant/cross appellee, the court concludes that the issues raised therein were fully considered upon the original oral argument and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk

OHIO REVISED CODE § 2307.382

2307.382 Personal Jurisdiction

(A) A court may exercise personal jurisdiction over a person who acts directly or by an agent, as to a cause of action arising from the person's:

(1) Transacting any business in this state;

(2) Contracting to supply services or goods in this state;

(3) Causing tortious injury by an act or omission in this state;

(4) Causing tortious injury in this state by an act or omission outside this state if he regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(5) Causing injury in this state to any person by breach of warranty expressly or impliedly made in the sale of goods outside this state when he might reasonably have expected such person to use, consume, or be affected by the goods in this state, provided that he also regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered in this state;

(6) Causing tortious injury in this state to any person by an act outside this state committed with the purpose of injuring persons, when he might reasonably have expected that some person would be injured thereby in this state;

(7) Causing tortious injury to any person by a criminal act, any element of which takes place in this state, which he commits or in the commission of which he is guilty of complicity.

(8) Having an interest in, using, or possessing real property in this state;

(9) Contracting to insure any person, property, or risk located within this state at the time of contracting.

(B) When jurisdiction over a person is based solely upon this section, only a cuase of action arising from acts enumerated in this section may be asserted against him.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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RUTH H. CREECH,	:	CIVIL NO. C-1-86-1271
	:	
Plaintiff,	:	Cincinnati, Ohio
	:	Monday, August 1, 1988
vs.	:	Tuesday, August 2, 1988
	:	Thurs., September 1, 1988
CITY OF FAITH	:	
HOSPITAL, et al.,	:	
Defendants.	:	

COMPLETE TESTIMONY OF RUTH CREECH
BEFORE THE HONORABLE CARL B. RUBIN,
CHIEF JUDGE, AND JURY

For the plaintiff: T. DAVID BURGESS, ESQ.
LAWRENCE FISSE, ESQ.
LOYAL ROACH, ESQ.

For the defendant City of Faith: RICHARD D. WAGNER, ESQ.

For the defendant Dr. McGee: JOSEPH M. BEST, ESQ.
CHARLES E. BROWN, ESQ.

For the defendants Roberts: LAWRENCE BARBIERE, ESQ.

For the defendant OREA: FREDERICK BROCKMEIER, ESQ.

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A. I believe it was channel 12.

Q. And that was in your home in Milford, Ohio?

A. Yes.

Q. Mrs. Creech, what program was that? Without telling us what the contents of that program would have been, do you know a name of the program?

A. "Expect a Miracle"

Q. Okay. And did you review those, or did you see "Expect a Miracle" programs produced by the Oral Roberts ministry in October and Nobember of 1985?

A. Yes, I did.

Q. And based on the representations contained within those programs, did you make a decision to go to the City of Faith?

A. Yes, I did.

Q. Now, Mrs. Creech, have you had an opportunity to review the programs that have been obtained through this lawsuit dealing with the programs in October and November of 1985?

A. Yes, I have.

Q. And do those programs fairly and accurately represent the programs you saw in October and November of 1985?

A. Yes, they do.

MR. BURGESS: Your Honor, I would ask the Court for permission to show those programs, and they will be

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you at this time.

Mr. Snyder escort the jury, please.

(Jury escorted from the courtroom.)

THE COURT: You may be seated. Mrs. Creech, you may leave the witness stand.

MR. BROWN: Your Honor, when there is a procedural matter, when there is need for all of us to get together on the defense side, is there a room available?

THE COURT: Sure, we can make a room available to you, and, by the way, may I advise out of town counsel particularly there is a lawyer's room on the 9th floor of this building, and your're not only free to use it, I would encourage you to use it. The key to it may be obtained from my office, and if you want to confer there, Mr. Brown, feel free. If there is some other room that we can provide, we'll be happy to do so.

All right. Mr. Wagner, I'll hear from you at this time on the motion in limine.

MR. WAGNER: Thank you, Your Honor, for taking this opportunity to again address the problem earlier mentioned in the record, and that is the two defendants I represent, City of Faith Hospital and City of Faith Medical and Research Center, were initially sued in this case under a single theory, and that is for vicarious [97] liability, alleged vicarious liability for alleged malpractice of physicians involving Mrs. Creech.

Under that theory, the case has proceeded through discovery. The case has proceeded through a second amended complaint, through answer and through pretrial order. Your Honor has held a pretrial conference in which I orally reaffirmed that my only interest was a malpractice allegation and my alleged vicarious liability. Your Honor has heard, and I will not take the time to go into the same arguments presented earlier, but Your Honor has heard our position with regard to the motion in limine, that my defendants had learned mere days before selection of this jury that plaintiff intended to claim that the hospital and/or medical and research center were vicariously liable for the acts of fraud and misrepresentation as made in the complaint.

At that time, we did claim and we again affirm surprise and inability to present adequately a proper defense to those claims. After Your Honor ruled or observed a few days ago that until you heard the evidence you would prefer not to make a ruling on that subject, it was my belief that Your Honor had wished me to advise Your Honor at the first glimmer, or first need I should say, of action with regard to that subject.

I now find myself in the position of cross-examining [98] the plaintiff. Being lead counsel, I must take the opportunity of examining her on all issues involving my clients. I feel very insecure at this point in time as far as being able to properly do that. If the claim against my clients is, in fact, involving matters other than strictly the malpractice claim, which has always been my understanding, then, Your Honor, I do wish to reurge my position. I will not go over those same arguments.

THE COURT: Well, Mr. Wagner, let me ask you a question. There is one area here that has still not been made completely clear to me. I'm not sure of the structure of the defendant, defendants. Obviously, the hospital and the clinic made no representations, and, equally obviously, neither the hospital nor the clinic as separate defendants ever appeared in the State of Ohio. How would you respond, however, to the argument that the representations that were made in Ohio were made by agents of the defendants?

MR. WAGNER: My response, Judge, would be that there is no factual foundation for that representation, other than the fact that we were a benefactor of, you might say, solicitations made by the Roberts Ministry. We have always been a benefactor. The same as, you might say, the Red Cross may benefit from Your Honor's or my [99] support and solicitation on their behalf. This would not, of course, make us their agents.

The legal concept of agency has certain well recognized required elements of proof, none of which are in existence. I might advise Your Honor, although it's not in the record at this time, the Roberts were never on the board, as an example, of the hospital or clinic. There is no —

THE COURT: Were they on its payroll?

MR. WAGNER: No. There is no connection.

THE COURT: Who owns the hospital?

MR. WAGNER: The hospital is owned by — the physical premises of the hospital is owned by a corporation, an independent

corporation that has never been attacked in this case or, as far as I know, any other, as far as being an alter ego.

THE COURT: Is there some distinction that you draw between the land and structure and the operation of the hospital?

MR. WAGNER: Only in the sense, Judge, that we have the Medical and Research Center as a separate corporation.

THE COURT: Who operates the hospital?

MR. WAGNER: The hospital, City of Faith Hospital, Inc.

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THE COURT: Are either of the Roberts on the payroll of City of Faith Hospital, Inc.?

MR. WAGNER: No, sir. I would like to confirm that before I make a representation. That is correct.

THE COURT: All right. Is there a distinction between the ownership — well, let me back off. I assume that the ownership of all buildings and all lands is by this other corporation, not a party to this suit?

MR. WAGNER: The physical premises was built by the university.

THE COURT: Okay. And when you talk of the physical premises, you include in there both the research center and the hospital and whatever comes under the rather vague head of clinic?

MR. WAGNER: Building, yes, sir.

THE COURT: I understand. Land and building. Is there a difference between the operation of the hospital and the operation of the research — let me have the correct name for the record. Bear with me.

Let me ask the question again. Is there a difference between the operation of the City of Faith Hospital and the City of Faith Medical and Research Center?

MR. WAGNER: Completely separate.

THE COURT: Separate board of directors, these are separate corporations?

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MR. WAGNER: Yes, sir.

THE COURT: They both presumably pay rent to the same owner of the land and real estate?

MR. WAGNER: Yes.

THE COURT: Are the Roberts on the board of directors of the operation of the medical and research center?

MR. WAGNER: No, sir.

THE COURT: Okay. All right. I would like to hear then from plaintiff's counsel.

MR. FISSE: If it may please the Court, Your Honor, Mr. Wagner characterizes the claim against the City of Faith as on the order of vicarious liability. Now, I know the Court, having discussed the principal agent concept, is aware of that claim as well. In addition, in essence, it's our claim that, not only is there a claim based upon principal agent, but these representations were sponsored by the City of Faith. If you look at the shows, and I have still pictures here which I have taken, each introduction to the show begins with a triangle, enclosed within it a pair of hands, "Expect a Miracle" over the top, underneath that "City of Faith."

THE COURT: Mr. Fisse, I don't want to prolong this. The notion of vicarious liability for fraud is a [102] strange one to me, and I would appreciate it if you could cite to me some Ohio authority. As I understand, the first and the most important element of fraud is an actual or implied representation as a matter of fact. And I don't believe the hospital or the research center made a representation. I think the Roberts did. And I have difficulty following how the hospital can be liable in fraud unless you have got a conspiracy or an aiding and abetting. Fraud is not presumed. You agree with that?

MR. FISSE: I understand.

THE COURT: What is your authority for the concept that there may be a liability aside from aiding and abetting or conspiracy?

MR. FISSE: First of all, it's not our position that it's vicarious liability. That's Mr. Wagner's position. There is Ohio law, if I may get Mr. Burgess's jury instructions on that matter, which sets forth our authority for the position of liability based upon a principal agent theory. If the Court would examine, and we can provide the Court with copy of the Ohio case, *Taylor v. Wilson*, 44 Ohio Appellate 100.

THE COURT: Where do you cite this in your proposed instructions?

MR. FISSE: It's at — it's instruction number [103] 10, instructions number 9 and 10. Nine refers generally to Ohio Jurisprudence 3rd 51, Section 175.

THE COURT: Well, obviously, you haven't — there is no proof here, and perhaps you may argue that you haven't had an opportunity to prove it.

MR. FISSE: Well, in addition, I think the Court —

THE COURT: Do you agree that neither of the Roberts are in the employ of the defendant?

MR. FISSE: They may not be in the employ of the defendants, but in Mr. Oral Roberts' deposition, he stated that he was the authorized spokesman for the City of Faith, for the entire ministry, that the entire ministry included the City of Faith.

It included — something else the Court must understand. When he uses "City of Faith," he uses it as a generic term, essentially, which includes a concept, but which also includes the clinic, the medical and research center.

THE COURT: I'm aware of that, but we have established that none of the entities are entities by which he's employed or that on which he serves as a board. Do you have any evidence

to the contrary, or may I accept Mr. Wagner's statement, the land and building is owned by a corporation not a party to this action, the [104] hospital and the research center are governed by boards, neither of which the Roberts are members, and that the Roberts are not employees in the sense of receiving any income from either? Do you agree with that?

MR. FISSE: That's true, based upon my recollection. However, he —

THE COURT: All right. Then let's take that as a basis. So that the relationship, if any, is not established by employment. It's not established by ownership. Do you assert a conspiracy?

MR. FISSE: I think the complaint is broad enough to assert a conspiracy.

THE COURT: I'm not sure I agree with you.

MR. FISSE: Oral Roberts is essentially the chief benefactor. He promotes for the City of Faith. He directly solicited patients for the City of Faith. There is a connection to that extent between Mr. Oral Roberts and the City of Faith. The shows are essentially, at least they appear to be, sponsored by the City of Faith. Their name is on the beginning of each of the shows on the tapes that we showed yesterday.

THE COURT: Mr. Fisse, at the danger of creating error, I'm curious as to why you insist on these other entities. Are you asserting that Oral Roberts would not be answerable in damages if you got a judgment against [105] him?

MR. FISSE: No, we're not asserting that, Your Honor.

THE COURT: Well, there must be some reason, some strategic reason that escapes me, because, very frankly, this is a close enough question that, in my opinion, a favorable verdict to you could be overturned. I don't quite understand what is the significance of asserting fraud in an Ohio court of entities that have not taken any action in Ohio, are not the employer of those who did, and you're asserting, I presume, a third party beneficiary type of reaction, and I don't understand why.

MR. FISSE: No. The doctors, it's true, have not taken any action in the State of Ohio, but if we look at —

THE COURT: Neither has the hospital. The Roberts, it seems to me, the only theory of this case which I would agree that there is jurisdiction is the notion that they came into the State of Ohio through the television program. But unless there is some tie-in, and it's highly tenuous at best, I don't understand why you're insisting on this.

MR. FISSE: As did the City of Faith, Your Honor. If I may show the Court — may I approach the [106] bench and show the Court the copies of the still photographs we have taken showing the City of Faith appears, as I said, at the beginning of each show. On each show that we have shown, it appears at the bottom in under various portions, City of Faith Clinic appointments, with a telephone number.

THE COURT: Anything further that anybody wishes to advise? It is 10 minutes past 10. We will take our morning recess.

(Recess taken at 10:10 a.m.)

THE COURT: Gentlemen, at this particular point, I'm not prepared to rule on the motion in limine simply because there is evidence that could be presented by the plaintiff that would enable them to pursue this fraud claim. The point of departure was the matter of cross-examination and you, Mr. Wagner, wanted some instruction. The only instruction that I can give you is that I'm not going to limit your right of cross-examination, nor am I going to require that all cross-examination of the plaintiff be done at this time. I think that this is a problem that may very well require consideration at the end of the plaintiff's case. Rather than a motion in limine, it may be a motion to dismiss causes of action or a cause of action against certain defendants, so I suggest that you conduct whatever

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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RUTH H. CREECH,	:	CIVIL NO. C-1-86-1271
	:	
Plaintiff,	:	Cincinnati, Ohio
	:	August 1, 1988
vs.	:	August 2, 1988
	:	August 3, 1988
CITY OF FAITH	:	August 5, 1988
HOSPITAL, et al.,	:	August 8, 1988
	:	August 9, 1988
Defendants.	:	September 1 & 2, 1988

ALL CONFERENCES AND MOTIONS HEARD
OUTSIDE THE PRESENCE OF THE JURY
NOT CONTAINED IN OTHER TRANSCRIPTIONS
OF PROCEEDINGS
BEFORE THE HONORABLE CARL B. RUBIN,
CHIEF JUDGE,

For the plaintiff: T. DAVID BURGESS, ESQ.
LAWRENCE FISSE, ESQ.
LOYAL ROACH, ESQ.

For the defendant
City of Faith: RICHARD D. WAGNER, ESQ.

For the defendant
Dr. McGee: JOSEPH M. BEST, ESQ.
CHARLES E. BROWN, ESQ.
BRIAN HURLEY, ESQ.

For the defendants Roberts: LAWRENCE BARBIERE, ESQ.

and OREA: FREDERICK BROCKMEIER, ESQ.
DONALD BINGHAM ESQ.
CHARLES CHAPEL, ESQ.

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malpractice is as the Oklahoma law holds?

MR. BEST: I have assumed that all the time, Your Honor.

THE COURT: I did too. I don't see how it could be otherwise, but I thought I would check.

MR. ROACH: I would like to further assert that our position in regards to vicarious liability of the Hospital and Medical and Research Center for Dr. McGee is one based on Oklahoma law as well.

THE COURT: No problem. So far as I'm concerned, there are two general issues in this case, fraud and malpractice, and I simply wanted to get some understanding.

Okay. Let me then take up the second issue, and it is my recollection — I'm trying to recall the issue. The fraud problem, the vicarious liability was raised, and I would like to hear from counsel at this point.

Mr. Wagner, I think that was your point, was it not?

MR. WAGNER: Yes, sir.

THE COURT: All right. Would you approach the podium? I consider this to be the appropriate time, and previously it simply wasn't.

MR. WAGNER: Thank you, Your Honor.

THE COURT: You are asserting, as I understand it, a difference between the final pretrail order and [14] what they are now asserting?

MR. WAGNER: If the Court please, I had notes made for such an argument. May I get them?

THE COURT: Of course.

MR. WAGNER: If the Court please, and I will attempt to be more brief than I had planned to earlier. We have filed a motion in limine with Your Honor, and I believe it was styled "Motion In Limine or, In the Alternative, Motion For Continuance." The

purpose of that motion was to raise a concern that we did not have until a few days before we selected the jury in this case. At that time, during a telephone conference with the magistrate of this Court on procedural matters, after the magistrate left the line and while counsel for all parties were still on the line, it was mentioned by plaintiff's counsel that it was his intention to seek liability against the hospital and the clinic, that is vicarious liability for the alleged acts of fraud and misrepresentation.

THE COURT: On the fraud and misrepresentation only, not on the malpractice?

MR. WAGNER: No, sir. I acknowledge they sued us for vicarious liability for the malpractice of the doctors. I acknowledge that this is at issue and is a part of the pretrial order. There is no problem there. [15] My motion solely went to the statement of counsel to the effect that our, that is the hospital and clinic's exposure in this lawsuit was further than the malpractice claim. Therefore, I filed a motion, and in the motion with attached brief, I set out basically that we were never sued in the complaint or amended complaint for such vicarious liability, that this was never an issue in the case, that Your Honor sustained a motion for partial summary judgment, in effect, wiping out any issue except for our, that is the hospital's, vicarious liability as set forth in the pretrail order, that the pretrial order is entirely, absolutely and completely silent of any claim by plaintiff of vicarious liability on the fraud and misrepresentation count; and, therefore, I was required at first notice to claim surprise under the rules of this Court. And I did do so at that time, and we briefly discussed this, I believe, at the conference we had just before jury selection.

THE COURT: All right. I will hear from plaintiff in this regard. Mr. Fisse?

MR. FISSE: Your Honor, it's our position that the fraud claim against the City of Faith is included in the first claim of the second amended complaint as filed with this Court and that that was sufficient notice.

THE COURT: Bear with me. I'm not so sure about [16] that. I'm going to ask you very shortly to show me where in the final pretrial order this is set forth, because one of the purposes of the final pretrial order is to eliminate issues and to focus on what is going to be tried. Bear with me just a moment.

All right. Your first claim covers the first 17 paragraphs. What paragraph do you call my attention to as to vicarious liability on the fraud?

MR. FISSE: If I may have a moment to get the second amended —

THE COURT: Take your time, Mr. Fisse.

MR. FISSE: Well, in numerical order, the first aspect of the fraud claim asserted against the City of Faith would be paragraph two, which asserts in essence, at least as we intended it to insert, a principal agent relationship between Oral Robert, Richard Roberts and City of Faith. Paragraph four designates who the City of Faith is, essentially that they were a hospital.

THE COURT: That's a separate legal entity from Oral Roberts?

MR. FISSE: That's true. I can't point you to a specific claim in this complaint which specifically asserts a fraud claim against the City of Faith Hospital.

THE COURT: Can you point it out in the final pretrial order?

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MR. FISSE: I can't point it out in the final pretrial order. It was mentioned at that time to my recollection, but it is not in the final pretrial order.

THE COURT: Well, I recognize that, in the federal courts, we deal with notice pleading, and I would be far less concerned if there was something in the final pretrial order, but I don't even see conceptually how you have a claim against anybody other than the Roberts for the fraud. Now, there is an aiding and abetting

fraud, if that's what you're talking about, but there has to be a knowing and substantial assistance of such fraud by the accused aider and abettor.

I'm not going to rule at this time, but at the end of your case, be prepared, because I just might say I don't follow that. I can see the aiding and abetting of malpractice. I can see the claim of fraud. You may be able to prove fraud, but I don't see how these other entities can be included in the fraud unless you're suggesting aiding abetting.

MR. FISSE: We believe and we think, as we develop the evidence, that will become more clear. And we, along with our jury instructions, we did submit some authority on a principal's liability for the fraud of an agent. In this case, as we're approaching it, Oral and Richard Roberts acting as an agent for the City of Faith, [18] and we think that the evidence will show that as we go along.

THE COURT: I'm not prepared to agree with your principal and agent rule on fraud, but that's — I don't care for the moment.

I also want to straighten out the parties which, I must confess, I'm a little bit confused about. I'm aware of an entity known as City of Faith Hospital, and I'm aware of an entity know as the City of Faith Medical and Research Center, but I'm not aware of an entity known as City of Faith Hospital Clinic, and, as a matter of fact, there is no such entity that is listed as a party in this lawsuit.

MR. WAGNER: There was initially, Judge, a named, an alleged named party City of Faith Clinic. I'm not sure if the pretrial order speaks to it or not, but it's pointed out in our brief there is no such entity in existence. The City of Faith Research, Medical and Research Center, is many times generically referred to as the clinic.

THE COURT: Okay. But am I correct that the last complaint filed, the second amended complaint of April 14, 1988, that's the one on which this matter is proceeding, and there is no defendant the City of Faith Clinic? And, therefore, I'm not going to permit a

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

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RUTH H. CREECH,	:	CIVIL NO. C-1-86-1271
	:	
Plaintiff,	:	Cincinnati, Ohio
	:	Monday, August 8, 1988
vs.	:	
	:	
CITY OF FAITH	:	
HOSPITAL, et al.,	:	
Defendants.	:	

TESTIMONY OF MARK SWADENER
BEFORE THE HONORABLE CARL B. RUBIN,
CHIEF JUDGE,
AND JURY

For the plaintiff: T. DAVID BURGESS, ESQ.
LAWRENCE FISSE, ESQ.
LOYAL ROACH, ESQ.

For the defendant
City of Faith: RICHARD D. WAGNER, ESQ.

For the defendant
Dr. McGee: JOSEPH M. BEST, ESQ.
CHARLES E. BROWN, ESQ.

For the defendants Roberts: LAWRENCE BARBIERE, ESQ.

For the defendant
OREA: FREDERICK BROCKMEIER, ESQ.

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Q. Would those records include expenses dealing with advertising?

A. Yes, they would.

Q. Now, directing your attention to the "Expect a Miracle" program, do you know — first of all, are you familiar with that program?

A. Yes, I am.

Q. And is that program a program sponsored by the Oral Roberts Ministries?

A. By the Oral Roberts Evangelistic Association.

Q. And that would include segments dealing with the City of Faith Hospital; is that correct?

A. Not on every show, but, yes, it has from time to time.

Q. And, likewise, the City of Faith Medical and Research Center?

A. It's probably more broadly termed the City of Faith, yes.

Q. And that broadcast would include an appeal directed to a national audience for patients to come to the City of Faith Hospital; is that not true?

A. Generally, yes.

Q. And, likewise, a national appeal to come to the City of Faith Medical and Research Center?

A. Yes. I don't know if I would use the world "appeal."

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A. Yes.

Q. You indicated, sir, that the Oral Roberts Evangelistic Association bore the costs of "Expect a Miracle," correct?

A. That is correct.

Q. So it goes without saying that Dr. McGee paid no part of that; is that correct?

A. That is correct also.

MR. BROWN: Thank you. That's all I have.

THE COURT: Mr. Wagner, do you wish to inquire?

MR. WAGNER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. WAGNER:

Q. Mr. Swadener, in your use the term Oral Roberts Ministries, what do you mean?

A. All entities that are under the general umbrella of Oral Roberts Evangelistic Association.

Q. That would be OREA, Oral Roberts Evangelistic Association, as well as those entities that the ministry gave birth to at one time or another by contribution; is that right?

A. That is correct. Or not necessarily contributions. Could be just a start of organization for profit entity.

Q. With regard to the hospital and the medical and research center, and for the purpose of my questions let

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being asked for.

Q. And after that application is on file and after all the procedure is gone through, then is an order entered by the Oklahoma Health Planning Commission issuing a certificate?

A. Yes, I believe that's — I couldn't address the legal side of it, but that's the way we view it.

Q. And was that order entered April 26, 1978?

A. I don't know that. I don't know what the date was.

Q. Without taking the time to find it, there is a — there is only one order from the Health Planning Commission granting authority for a hospital to be built and run; is that right?

A. Yes, I would say that.

Q. To whom was that order authorizing the existence of the City of Faith Hospital issued?

A. I don't know for sure. I would assume it was the university.

Q. After that certificate was issued, then a hospital was built; is that right?

A. Correct. There is a lot in between there, but, yes.

Q. We have heard one defendant in this case referred to as the City of Faith Hospital as well as the second defendant I represent, City of Faith Medical and Research Center. Can you explain to me if either of those [11] entities have any relationship with each other or with any other entities?

A. Well, they're all separate legal and distinct entities. The City of Faith Medical and Research Center, which we know as the clinic, is what we call a 501 K; they're a separate not-for-profit organization, as is the City of Faith Hospital. The fact that certain management personnel such as myself cross over certain lines would say there is a relationship, but there may not be any financial relationships that occur, although there are between clinic and hospital.

Q. Now, may I assume sir, that the ministry, generally speaking, wants the hospital to do well?

A. Yes. Better than it is, yes.

Q. And in this regard, who determines how much contribution or how much is given by the ministries to the hospital and the medical and research center to help them financially?

A. There are really two classes of contributions. First are donor-restricted. If you have a donor send in money and you want to restrict it for either the City of Faith Medical and Research Center or the City of Faith Hospital, then it would go for that purpose. Unrestricted contributions are a little bit more difficult, and they also go through a budgeting process

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it is "Expect a Miracle," because the "Expect a Miracle" is only

a half hour on Sunday morning, and it's very difficult to put somebody on that program for any length of time and explain adequately what the message is.

Q. But that has occurred on the "Expect a Miracle" program?

A. Yes. And Oral has been in the hospital or in the City of Faith Medical and Research Center when he has taped. I mean, if you see the program on Sunday morning, sometimes his program will be taped at the hospital.

MR. BROWN: Objection.

THE COURT: Sustained. The jury is instructed to disregard the last comment of the witness.

I think this is becoming repetitious, Mr. Burgess. You may continue.

MR. BURGESS: Thank you, Your Honor.

Q. Now, based on your knowledge as to the financial affairs of the Oral Roberts Ministry, was there a need for patients at the City of Faith Hospital and the City of Faith Medical and Research Center in 1985?

MR. WAGNER: Objection.

THE COURT: Objection sustained.

Q. In the "Expect a Miracle" programs, to your knowledge, would there have been representations as to the hospital and the clinic as far as numbers, not [17] numbers, but phone numbers to call to seek the services of the hospital and the research center?

A. Generally, there would be a character-generated line at the bottom with a phone number to call for appointments.

Q. And to your knowledge, would people respond to that phone number?

A. Generally, yes.

Q. And patients would come from throughout the country?

THE COURT: Mr. Burgess, now, come on, you have gone through this. I don't think it's appropriate to do it twice.

MR. BURGESS: Okay. No further questions, Your Honor.

THE COURT: Anything further of this witness?

MR. BROWN: No, Your Honor.

THE COURT: Any questions from the jury? Mr. Swadener, you may be excused.

TESTIMONY CONCLUDED

CERTIFICATE

I, Betty J. Schwab, the undersigned, do hereby certify that the foregoing is a correct transcript from the record of the proceedings in the above-entitled matter.

s/s Betty J. Schwab,
Official Court Reporter

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

- - -

RUTH H. CREECH,	:	CIVIL NO. C-1-86-1271
	:	
Plaintiff,	:	Cincinnati, Ohio
	:	August 2, 1988
vs.	:	
	:	
CITY OF FAITH	:	
HOSPITAL, et al.,	:	
Defendants.	:	

DEPOSITION TESTIMONY OF ORAL ROBERTS
BEFORE THE HONORABLE CARL B. RUBIN,
CHIEF JUDGE,
AND JURY

For the plaintiff: T. DAVID BURGESS, ESQ.
LAWRENCE FISSE, ESQ.
LOYAL ROACH, ESQ.

For the defendant
City of Faith: RICHARD D. WAGNER, ESQ.

For the defendant
Dr. McGee: JOSEPH M. BEST, ESQ.
CHARLES E. BROWN, ESQ.

For the defendants Roberts: LAWRENCE BARBIERE, ESQ.

For the defendant
OREA: FREDERICK BROCKMEIER, ESQ.

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patients coming to the City of Faith? Let's leave out the word "attract."

A. Would you rephrase that question?

Q. Okay. People from all over of the country and all over the world come to the City of Faith?

A. I believe that's a fair statement.

Q. And that was part of the original concept that you promoted to attract people from all over this country and all over the world to come to the City of Faith?

A. If you'll rephrase it.

Q. Do patients come to the City of Faith from all over this country, probably every state in this country, as well as foreign countries throughout the world?

A. At far as I know?

Q. Okay. And are treated at the City of Faith?

A. Yes, sir.

Q. And would you classify it then as an international hospital?

A. From the standpoint that the following of the ministry is international.

Q. By that answer, you're not — as to the City of Faith, is that within the ministry?

A. Yes, sir. The university, the evangelistic association, my ministry is multi-faceted.

Q. So then the appeal for the hospital would be

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Q. And do you expect people to come to the City of Faith Hospital based upon the statements you make on your program, "Expect a Miracle"?

A. Well, I hope as many people who believe in the concept that

the City of Faith is based on, as many as possible that we can serve will come.

Q. You would like to have as many as you could possibly get that feel a need to be there; isn't that that?

A. Depending upon our ability to serve them, yes.

Q. Now, in that regard, in inviting people to the City of Faith Hospital and the City of Faith Medical and Research Center on your program "Expect a Miracle," is it not true that you are acting as a spokesman at least that capacity for the City of Faith Hospital and the City of Faith Medical and Research Center?

A. For the entire ministry.

Q. And the total ministry you're referring to is —

A. Well, it's the gospel.

Q. Does it have a name, Oral Roberts Evangelistic Association? Is that the ministry you're talking about?

A. It depends upon the face of it. If it's the university that we have open to students who are interested in that type of Christian university and if we can help you in your spiritual life to lead you to Christ — as I said, it's multi-faceted.